IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLN.NO.972 OF 2007

Machhindra @ Bandu Murlidhar Gaikwad ..Applicant

Vs.

State of Maharashtra ..Respondents

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Mr.S.K.Shinde with Sagar Kasar advocate for applicant
Mr.V.B.Konde-Deshmukh A.P.P. for the State

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CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : APRIL 17, 2007

P.C.

1. Heard the learned advocate for the applicant, and the learned A.P.P. for the State.

2. The applicant is seeking bail in C.R.-II-41 of 2006 of Lasalgaon Police Station. The said case is under Sections 3(1)(x)& 3(1)(iv) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act and also under Sections 489, 323, 504, 506 r.w. 34 of IPC.

3. The applicant had preferred an application for anticipatory bail before this Court. During the

hearing of this application, it was stated by the counsel for the applicant that the applicant shall surrender before the appropriate court and prefer an application for bail. In order to enable the applicant to take necessary steps interim protection granted earlier in respect of arrest is extended to 27.4.07.

4. In the present case, the investigation is over and the charge sheet is filed. The applicant was granted anticipatory bail by this Court by order dated 20.12.2006. This Court granted anticipatory bail for a temporary period till filing of charge sheet. In the said order, it is stated that after filing of the charge sheet the applicant would be free to file application before appropriate court for appropriate reliefs. Hence, after filing of charge sheet the applicant preferred an application for bail before the Sessions Court. It is stated by the learned advocate for the applicant that when the applicant moved the Sessions court for regular bail under Section 439 vide criminal application No.50 of 2007, the applicant remained present before the court and submitted himself to the jurisdiction of Sessions court and thus he was in

custody of the said court. However, according to the Sessions Court, unless the applicant is taken into custody and or is in magisterial custody he cannot be termed to be in custody and thus, the bail application filed by the applicant cannot be entertained till then. After observing this, the application for bail came to be rejected. Thereafter, the applicant preferred another application for bail i.e. Cri.Application No.57 of 2007 wherein reliance was placed on various decisions of the Supreme Court. However, the said application also came to be dismissed. Hence, this application has been preferred.

5. The learned Sessions Judge has observed that the High Court directed that the applicant would be free to approach appropriate Court for appropriate relief which in the opinion of learned Sessions Judge was the Judicial Magistrate F.C.Niphad, hence, the application for bail ought to have been preferred before the Judicial Magistrate F.C. The learned Sessions Judge further observed that bail cannot be granted to the applicant as he has not been arrested by the police nor was he in judicial custody. On this ground, bail application of the

applicant came to be rejected.

6. It appears that the Special Court is of the view that no person accused of an offence can move the Court for bail under Section 439 unless he is in custody. In my view, where the accused has appeared and surrendered before the Court in such case, the Sessions Court would have jurisdiction to consider the bail application as the accused shall be considered to be in custody within the meaning of Section 439 of Cr.P.C. Custody in the context of section 439 is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court. An accused can be said to be in custody not merely when the police arrest him, produce him before the Magistrate and get a remand to judicial or other custody but the accused can also be said to be in judicial custody when he surrenders before the court and submits to its directions. I am fortified in my view by the decision of the Supreme Court in the case of **Niranjan Singh and another Vs. Prabhakar Rajaram Kharote and others AIR 1980 S.C. 785**.

. It is clear that there is no impediment to decide the application for bail preferred by the applicant after he has surrendered before the court. To consider the said application for bail it is not at all necessary that the accused should be arrested and produced before the Court or that he should be in judicial custody. In this view of the matter, the interim order granted by this Court is extended upto 30.4.2007 to enable the application for bail to be considered by the Sessions Court on the applicant surrendering himself before the sessions court. The said application for bail to be considered afresh without being influenced by the order passed in Application Nos.50 of 2007 and 57 of 2007.

7. Application is disposed of in the above terms.

[Smt.V.K.Tahilramani, J.]